

**Shellmaker, Inc., and Bayside Dredging Company,
Inc. and Operating Engineers, Local Union No.
3, International Union of Operating Engineers,
AFL-CIO, Case 20-CA-16188(E)**

5 August 1983

**SUPPLEMENTAL DECISION AND
ORDER**

BY MEMBERS JENKINS, ZIMMERMAN, AND
HUNTER

On 1 March 1983 Administrative Law Judge Jay R. Pollack issued the attached Supplemental Decision in this proceeding.¹ Thereafter, the Applicants filed exceptions and a supporting brief, and the General Counsel filed an answering brief in response to the exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

It is hereby ordered that the applications of the Applicants, Shellmaker, Inc., and Bayside Dredging Company, Inc., Petaluma, California, for awards under the Equal Access to Justice Act be, and they hereby are, dismissed.

¹ The Board's original Decision and Order herein is reported at 265 NLRB 749 (1982).

SUPPLEMENTAL DECISION

(EQUAL ACCESS TO JUSTICE ACT)

JAY R. POLLACK, Administrative Law Judge: On December 8, 1982, the National Labor Relations Board issued a Decision and Order in the above-captioned case (265 NLRB 749) adopting my recommended Order, dismissing the complaint in its entirety.

On January 7, 1983, Respondent Shellmaker, Inc., and Respondent Bayside Dredging Company, herein called the Applicants, each filed with the Board in Washington, D.C., an application for award of fees and expenses, pursuant to the Equal Access to Justice Act, Pub. L. 96-481, 94 Stat. 2325 (EAJA), and Section 102.143 of the Board's Rules and Regulations, Series 8, as amended. On January 13, the Board referred this matter to me for appropriate action. Thereafter, on February 5, 1983, the General Counsel filed a motion to dismiss the applications. The Applicants jointly filed an opposition to the motion to dismiss, dated February 23, 1983.

The gravamen of the General Counsel's motion to dismiss is that the General Counsel's position in the under-

lying unfair labor practice case was substantially justified.¹

EAJA provides that an administrative agency award a prevailing party certain expenses incurred in connection with an adversary adjudication, unless the agency finds that the position of the Government was "substantially justified." Although EAJA is silent on the meaning of the "substantially justified" standard, the legislative history of EAJA contains the following instructive passage:

The test of whether or not a Government action is substantially justified is essentially one of reasonableness. Where the Government can show that its case had a reasonable basis both in law and fact, no award will be made. In this regard, the strong deterrents to contesting Government action require that the burden of proof rest with the Government. This allocation of the burden, in fact, reflects a general tendency to place the burden of proof on the party who had readier access to and knowledge of the facts in question. The committee believes that it is far easier for the Government, which has control of the evidence, to prove the reasonableness of its action than it is for a private party to marshal the facts to prove that the Government was unreasonable.

* * * * *

The standard, however, should not be read to raise a presumption that the Government position was not substantially justified simply because it lost the case. Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing.

H.R. Rep. No. 1418, 96th Cong., 2d sess. 10 (1980), reprinted in 5 U.S. Code Cong. & Ad. News 4984, 4989. See *Enerhaul, Inc.*, 263 NLRB No. 121 (1982), slip. op., p. 2. See also S. Rep. No. 253, 96th Cong., 2d sess. 6-7 (1980).

In the underlying unfair labor practice case, the General Counsel alleges that the Applicants violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing and refusing to apply the collective-bargaining agreement of Shellmaker, Inc., to the employees of Bayside Dredging Company. In my Decision I found, *inter alia*, that the formation of Bayside was suspicious and further that Bayside would never have started in business without the aid of William Boland, then president of Shellmaker. However, I found that the evidence on the whole did not preponderate in favor of the General Counsel's allegations in the complaint. Accordingly, I recommended dismissal of the case.

In my view, under a reasonableness standard, the Government should not be assessed costs in this case. This was a close case and the Government's position, although not prevailing, was reasonable both in law and

¹ In view of the disposition of the case, the other issues raised by the General Counsel's motion need not be addressed. Further, in view of the disposition of the case, the Applicants' motions to withhold the financial information filed with their applications are hereby granted.

fact.² EAJA was not intended to stifle the reasonable regulatory efforts of Federal agencies. *Wyandotte Savings Bank v. N.L.R.B.*, 682 F.2d 119, 120 (6th Cir. 1982). Similarly, EAJA was not intended to deter the Government from advancing in good faith a close question of law or fact. As the General Counsel's position was clearly reasonable both as to the law and the facts, I find that further proceedings are unwarranted and that the applications should be dismissed.

Upon the foregoing findings and conclusions, the record in the underlying unfair labor practice case, and the pleadings herein, and pursuant to Section 102.153 of

² My Decision, particularly pp. 9-13, indicates that this was indeed a close case.

the Board's Rules and Regulations, I hereby issue the following recommended:

ORDER³

It is hereby ordered that the applications of the Applicants, Shellmaker, Inc., and Bayside Dredging Company, Inc., for awards under the Equal Access to Justice Act be, and they hereby are dismissed.

³ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.